No. 12139

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANGEL L. PACK,

Appellant,

vs.

UNITED STATES OF AMERICA and LILLY PACK,

Appellees.

REPLY BRIEF OF APPELLANT.

SYLVESTER HOFFMANN,
IRVING G. BISHOP,
810 Chester Williams Building, Los Angeles 13,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

STATUTES

TEXTBOOKS

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Foreword.

Since the arguments presented in the respective reply briefs of appellees are common to both, all reference in this, appellant's reply brief, will be to the brief of appellee United States of America.

ARGUMENT.

I.

Section 454a Is Inapplicable.

Appellees rely largely on Section 454a, Title 38, U. S. C. A., as prohibiting appellant from securing any relief under either of her two claims as set forth in her complaint: (1) That the insurance was community property and she, as surviving widow, had a vested interest in one-half thereof and that the designation of Lilly as beneficiary

was void as to one-half of the insurance (Appellant's Brief pp. 8-10), (2) that if she cannot recover under such claims, then as between appellant and appellee Lilly, that the latter holds one-half of the insurance in trust for appellant, and should be required to assign one-half thereof to appellant (Appellant's Brief pp. 11-14).

Likewise, the two lower court decisions appellees also rely upon, *Barton v. U. S.,* 75 Fed. Supp. 703, and *Johnson v. Sheldon* (Appendix to Appellee's Brief), place great emphasis on Section 454a. While both of those decisions were over-ruled in *Wissner v. Wissner,* 89 A. C. A. 857, 201 P. 2d 837, it is believed that Section 454a (formerly Section 454), should be analyzed. Incidentally, appellee United States joined in the petition for hearing by the Supreme Court of California, in the *Wissner* case, and urged the same grounds as it is urging upon this appeal; the petition was denied.

Section 454a, Title 38, U. S. C. A. provides that:

> (1) "Payment of benefits . . . made to or on account of a beneficiary, (2) shall not be assignable, (3) shall be exempt from *claims of creditors,* (4) and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever either before or after receipt by the beneficiary"; and (5) "such provisions shall not attach to *claims* of the United States. . . ." (Emphasis added.)

Analysis as to each clause:

(1) "Payment of *benefits*" does not negative the premise that appellant may require delivery to her of an assignment of one-half of the *insurance,* itself, or preclude her from asserting her vested interest in one-half of the insurance is *her property.*

(2) This clause is inapplicable, for under the express authority given by Section 816, Title 38, U. S. C. A., relating to National Service Life Insurance, appellee, Lilly, may lawfully assign to appellant, Angel, one-half of the insurance, since (a) Angel is the widow of the insured and (b) no payments have yet been made by the Veterans' Administration under the insurance sued upon, and the prohibitions of Section 454a are expressly excluded as to such an assignment. Hence, such insurance *is* assignable, and the Court, having jurisdiction over the parties, may require Lilly to make the assignment, under recognized equitable principles.

Even had Section 816 not been amended in 1946, Federal statutes prohibiting assignment are not applicable to those which arise by operation of law or to those founded upon equitable principles, but relate solely to *voluntary* assignments.

Employers' Fire v. U. S. (C. C. A. 9), 167 F. 2d 655;

Aetna v. U. S. (1948), 170 F. 2d 469;

U. S. v. So. Carolina (1948), 171 F. 2d 893.

(3) This clause expressly limits the exemption under Section 454a to the "claims of *creditors.*" Angel does not assert any claim as a *creditor* of Lilly; appellant claims that she owns one-half of the insurance or, in the alternative, that Lilly holds such half in trust for appellant. She also asserts that the insured's designation of Lilly as beneficiary was void as to her vested one-half community interest. The Courts have repeatedly held that unless a debtor-creditor relationship exists, the exemption under Section 454a (and former Section 454), limited as it is

to "claims of creditors," is inapplicable. Some of such cases are:

Gaskins v. Security Bank (1939), 30 Cal. App. 2d 409, 86 P. 2d 681;

In re Flanagan (1940), 31 Fed. Supp. 402;

Schlaeffer v. Schlaeffer (1940), 112 F. 2d 177 (under similar statute);

In re Bagnall (1947), 238 Ia. 905, 29 N. W. 2d 597;

In re Giambastiani (1934), 1 Cal. App. 2d 639, 37 P. 2d 142;

Hannah v. Hannah (1940), 191 Ga. 134, 11 S. E. 2d 779;

Stirgus v. Stirgus (1935), 172 Miss. 337, 160 So. 285 (holding that "creditor," in Section 454 [now Section 454a], contemplates an ordinary contractual obligation or statutory debt and not a claim, as here, arising by operation of law);

Arms v. Arms (1935), 260 Ky. 634, 86 S. W. 2d 542;

Stone v. Stone (1934), 118 Ark. 622, 67 S. W. 2d 189;

In re Gardner (1936), 220 Wis. 493, 264 N. W. 643;

Tully v. Tully (1893), 159 Mass. 91, 34 N. E. 79;

Gainey v. Bank (1933), 176 Ga. 796, 168 S. E. 877;

Bostrom v. Bostrom (1931), 60 N. D. 702, 236 N. W. 733;

Hines v. McKenzie (1933), 216 Ia. 1388, 250 N. W. 687 ("A 'creditor' is a person to whom a debt is owing by another person");

Hollis v. Bryan (1932), 166 Miss. 874, 143 So. 687.

In each of these cases Section 454a (or its predecessor, Section 454) and the limits of the exemption thereby afforded, was directly before the Court (except in the *Schlaeffer* case, where a similar statute was involved) and in each case it was held that the relationship there established, such as a wife seeking alimony, the right of a child to paternal support, the right of a guardian for reimbursement, was *not* a debtor-creditor relationship and the exemptions created by Section 454a were inapplicable.

Appellees (Appellee's Brief p. 11) cite *Culp v. Webster* (1937), 25 Cal. App. 2d Supp. 759, 70 P. 2d 273, where an admitted *creditor* of a veteran sought to levy upon proceeds of Adjusted Service Bonds under a money judgment, and cite *Pagel v. Pagel* (1934), 291 U. S. 473, 54 S. Ct. 497, where the sole question related to the claim of an admitted *creditor*. They also cite *Lewis v. U. S.*, and *Lawrence v. Shaw,* but neither are in point on this subject.

(4) This clause relates to the preceding words "claims of creditors." The words "attachment, levy and seizure" all relate to the normal aids to enforce judgments for the collection of money demands.

Thus, an "attachment" is a proceeding or writ, the object of which is to hold property to abide the order of the Court for the payment of a money demand.

7 C. J. S. 185.

A "levy" is the raising of the money for which an execution has been issued.

Bouvier's Law Dictionary, p. 694.

And a "seizure" is the act of taking possession of the property of a person by a judicial officer, to pay a certain sum of money by virtue of an execution.

Id., p. 1099.

The words "by or under any legal or equitable process whatever" obviously relate wholly to "attachment, levy or seizure," and were used as an implementation of those words, to afford the fullest protection against claims and actions upon money demands by *creditors.*

(5) The repetition of the word *claims* in this clause emphasizes that Congress did not intend Section 454a, made generally applicable to National Service Life Insurance by Section 816, Title 38, U. S. C. A., to apply under circumstances as here exist.

Finally, as the Chief Judge of the District Court, Southern District of California, held in *Hoeppel v. Westover* (1948), 79 Fed. Supp. 794, the exemptions created by Section 454a cannot be extended, through liberality of construction, beyond the plain language of that section.

II.

State Community Property Laws ARE Applicable.

This point is not one of first impression. In addition to being upheld by the California courts (*Wissner v. Wissner,* 89 A. C. A. 857, 201 P. 2d 837, hearing denied by California Supreme Court), the United States Court of Appeals, Fifth Circuit, in 1930, reached a like conclusion in *U. S. v. Robinson,* 40 F. 2d 14, wherein it was held that the community property laws of Louisiana must alone determine the respective rights of the adverse claimants to the deceased soldier's insurance. There, as here, the wife of the insured was not designated by him as beneficiary. The Fifth Circuit held:

> "It is the settled law of Louisiana that the proceeds of an insurance policy taken out during marriage belongs to the community" (*loc. cit.* p. 16).
>
> "The law of Louisiana controls, it being the domicile of the insured" (*loc. cit.* p. 17).

The judgment of the District Court was reversed, with direction that judgment be entered awarding the widow one-half of the deceased's insurance, which is precisely the relief contended for, here, by appellant.

Succession of Lynch v. U. S. (1936), 17 Fed. Supp. 674, follows and cites *U. S. v. Robinson,* and holds that the community property laws of the State of the deceased veteran's domicile control. No appeal was taken.

The United States, in *U. S. v. Primilton* (C. C. A. 5, 1935), 76 F. 2d 555, insisted, on appeal from an adverse judgment (as defendant in the lower court) that the insurance *was* governed by the law of the insured's domicile and *was community property* and the appellee United States therein relied upon *U. S. v. Robinson.*

In *U. S. v. Rose* (Texas, 1933), 57 S. W. 2d 350, the evidence showed that the veteran and his wife were residents of Oklahoma, before and after his enlistment and the Court held that the division of the insurance in effect on his death was controlled by the law of his residence (Oklahoma), found that, as here, the premiums were paid from community earnings, and awarded one-half of the insurance to the widow. Appellee, United States, was a party to that action. *U. S. v. Robinson,* above, is cited with approval.

In *Succession of Jones* (1936), 185 La. 378, 169 So. 440, all premiums were paid during wedlock out of the soldier's pay, which, as here, was held to be community property of soldier and his wife, both of whom were residents of a "Community Property" state. The Court further held that such insurance became "a community asset," and that the wife "was entitled to one-half thereof as the surviving spouse in community." *U. S. v. Robinson* is cited with approval.

U. S. v. Robinson is also cited, with approval, in:

Beebe v. Moormack Gulf Lines (C. C. A. 5, 1932), 59 F. 2d 319;

Fulton Mills v. Fernandez (La. 1935), 159 So. 339.

Appellee United States places reliance upon *James v. U. S.* (D. C., S. D. Cal. 1947, unreported), setting forth excerpts from Judge Harrison's Findings and Conclusions of Law at pages 6-11 of Appendix to its brief.

The District Court found that the insured and his wife were residents of *Texas* and that no fraud had been alleged or proved as having been practiced between them. In holding that the surviving widow had no "community

property" interest in the insurance, the trial court followed and correctly applied the community property laws of Texas. Had the lower court likewise applied the community property laws to the case (*Pack v. U. S.*) now before you, appellant would have been awarded the full relief to which she is entitled.

Under *Texas* law the wife does *not* have a vested one-half interest in life insurance purchased with community funds, as she is given under California law.

Under Texas law the wife has but an expectancy (13 Vernon's Texas Civil Statutes, Title 75, Article 4619) and the wife under Texas law, cannot claim the proceeds of an insurance policy on the life of her husband, even though the premiums were paid wholly out of their community property, unless the naming of some third person as beneficiary was done with the express intent of defrauding her.

Jones v. Jones (Civ. App.), 146 S. W. 265;

Northwestern Life v. Whiteselle, 188 S. W. 22;

Howard v. Howard (1941), 158 S. W. 2d 591;

Volunteer Life v. Hardin (1946), 145 Tex. 245, 197 S. W. 2d 105, 168 A. L. R. 337.

The construction of a state statute by the highest court of the state is binding on a Federal District Court.

Metropolitan Life v. Skov (1943, Ore.), 51 Fed. Supp. 470 (community property interest of wife under insurance contract).

In the *James* case, above, since the Court correctly applied Texas law in denying the widow any community interest in the insurance, whatever else is stated in its decision is *dicta.*

In every reported case decided in either state or federal courts, with the sole exception of *Barton v. U. S.,* 75 Fed. Supp. 703, where the insured was domiciled, as here, in a "community property" state, and the question of the widow's community interest in the insurance was squarely before the Court, concerning insurance issued by the appellee United States, state law was applied, and the District Court erred in not applying such laws of California, under the stipulated facts in this case, and in entering judgment that appellant take nothing.

Notwithstanding the great weight of the decided cases to the contrary, wherein the foregoing was directly upheld, and wherein state law *was* applied in determining the respective rights of the conflicting claimants, appellees argue that such decisions must all be erroneous, citing *Beach v. U. S.,* 79 Fed. Supp. 747 (Appellee's Brief p. 14), which decision cites no authority in support of the portions appellees have quoted, and which case has not been cited as an authority on any point. Another District Court reached an opposite conclusion and applied local law in determining the status of a beneficiary: *Brown v. U. S.* (1947), 72 Fed. Supp. 153, which was affirmed (C. C. A. 3), 164 F. 2d 490; cert. denied, 333 U. S. 873.

In *Cassarello v. U. S.,* 279 Fed. 396 (Appellee's Brief p. 6), the Circuit Court refused to follow a local statute which, by its express terms, excluded insurance issued by the United States, and hence was inapplicable.

In *Lewis v. U. S.,* 56 F. 2d 563 (Appellee's Brief pp. 11, 14, 15), the Federal Court *applied* local law which

made a change of beneficiary executed on a Sunday, voidable, but held that, under the facts, insured had affirmed such act, and hence such change was valid between contesting claimants. Appellant in that case claimed the change of beneficiary was void, under local law. The Court applied local law. Here, Angel claims the designation of beneficiary void under local law (as to one-half of the insurance).

"When the Government goes into the business of insurance, it is permissible to apply to it the rules applicable to (private) insurance companies so far as transactions relating to insurance are concerned."

Mikell v. U. S. (C. C. A. 4, 1933), 64 F. 2d 310;

Brown v. U. S. (C. C. A. 9, 1933), 65 F. 2d 65;

Collins v. U. S. (C. C. A. 10, 1947), 161 F. 2d 64, 67 (cert. denied 331 U. S. 859).

Lawrence v. Shaw (1937), 300 U. S. 245, 57 S. Ct. 443, relied upon by appellees (and in *Barton v. U. S.* and *Johnson v. Shelton*) related only to the exemption from taxation under Section 454a. It may be conceded that Congress had power to enact all of Section 454a, and that the whole thereof is the "supreme law of the land," *but,* as appellant has shown, the prohibition as to assignment, contained in Section 454a, is expressly inapplicable to assignments under Section 816 between a beneficiary and the insured's widow and the exemption features of Section 454a are wholly inapplicable.

White v. U. S. (1926), 270 U. S. 175, 46 S. Ct. 274, is not in point, since appellant's claim is not as a named beneficiary, but arises out of operation of law, and is squarely based upon the fact (a) that one-half of the community insurance vested in her, and (b) that the designation of her mother-in-law, Lilly, as beneficiary, was void as to one-half of the insurance.

U. S. v. Williams (1937), 302 U. S. 46, 58 S. Ct. 81, also cited by appellees, holds, that an agreement between the insured and a beneficiary not to discontinue the insurance is not binding on the insurer (the United States) who had no knowledge of the agreement, did not consent to it and was not a party to it, and gives no comfort to appellees. It is abcdarian that a like result would have followed had the insurer been a private company. While there is *dicta* indicating that a soldier's pay is a gratuity since the sovereign could make everyone serve without pay, the United States taxes such pay as income, and if it were a gift, it would be tax-exempt to the donee. In *Pack v. U. S.,* here, it was stipulated that the Court found that the insured received earnings, which was the community property of himself and appellant [Tr. 24, both paras. II].

In *Wissner v. Wissner,* above, the effect of the Fifth Amendment is discussed. In *Lynch v. U. S.* (1934), 292 U. S. 571, 54 S. Ct. 840, the Supreme Court points out that these policies are legal obligations, although not entered into for gain, have the same dignity as other contracts of the United States, and "*are property and create vested rights,*" entitled to the full protection of the Fifth Amendment.

III.

Appellee United States Not Concerned With Separate Controversy Between Angel and Lilly.

The appellee United States is a mere stakeholder. It admits that it issued the insurance, that the policy was in full force when it matured by reason of the insured's death, and that it is obligated to make payment thereunder. Payment of one-half of the proceeds to Angel and the other half to Lilly will not increase its aggregate liability by one cent. It is confronted with conflicting claims asserted by Lilly and Angel, and will be protected by a final judgment (Section 445, Title 38, U. S. C. A.).

Appellant's first "cause of action" seeks one-half of the community insurance on the ground that such half is her property and that the insured's designation of Lilly was void, as to appellant, insofar as it might relate to such one-half of the insurance. (As stated by appellees, she has abandoned that part of her claim which alleged that the insured had made a written change of beneficiary in her favor.)

Appellant's second "cause of action" is against appellee, Lilly, alone, and appellant is not seeking to establish a trust against the United States and it is not concerned with the outcome of appellant's separate cause of action against Lilly.

Bostrom v. Bostrom (1931), 60 N. D. 792, 236 N. W. 733;

Calhoun v. Ussery (1930), 46 F. 2d 495.

In its brief, the United States (p. 18) refers to a "trustee" when it is the named beneficiary; but, here, Lilly is a trustee by operation of law and not one created by any will, deed of trust or other writing. Its arguments

that because the National Service Life Insurance Act doesn't expressly mention trustees by operation of law or involuntary trustees under the application of established equitable principles, no such relationship can exist, is much the same as its argument that as the Act doesn't expressly mention the community property rights of a surviving widow who can establish such rights, that such rights cannot exist. Such arguments might be thus answered: neither does the Act make any express provisions to the contrary (assuming that, notwithstanding the Fifth Amendment, Congress had the constitutional power to so provide). A further answer is found in the authorities cited by appellant under her Point II, above, and in her Point II, pages 11-14 of her opening brief.

While appellee United States blandly states "there is no authority of law to compel the appellee, Lilly Pack, to make an assignment in favor of the appellant," without citing any authority, it is Hornbook law that a resulting or constructive trustee may be required, under the equity powers of a court, to make a conveyance or execute an assignment to the person entitled thereto of property wrongfully withheld from or belonging to such person, and direct that the Clerk of the Court do so, in the trustee's name and stead, should the trustee fail or refuse to do so. There is nothing in Section 816 which states that the assignment thereby permitted *must* be made voluntarily, and *cannot* be made in response to a proper direction from a District Court.

Dated: April 6, 1949.

Respectfully submitted,

SYLVESTER HOFFMANN,
IRVING G. BISHOP,
Attorneys for Appellant.